SEPARATE OPINION OF JUDGE EDUARDO VIO GROSSI,
CASE OF DÍAZ PEÑA *v.* VENEZUELA
JUDGMENT OF JUNE 26, 2012
(*Preliminary objection, merits, reparations and costs*)

Introduction

The dissenting opinion with regard to the judgment in reference (hereinafter "the Judgment") is presented, because the undersigned considers that the preliminary objection filed by the Bolivarian Republic of Venezuela (hereinafter "the State") concerning the prior exhaustion of domestic remedies was admissible as regards the whole of the instant case and not only part of it, as indicated in this judgment, because, since this requirement had not been complied with opportunely, the Inter-American Commission on Human Rights (hereinafter "the Commission") should have declared the petition lodged before, which originated the case, inadmissible. Consequently, the Commission should have abstained from processing the petition and, subsequently, submitting it to the Inter-American Court of Human Rights (hereinafter "the Court"). Hence, it was not incumbent on the Court to rule on its merits. The foregoing for the following reasons.

1. Decision on the admissibility of the petition

Based on the provisions of Articles 44,[1] 45(1) and (2),[2] 46)(1)(a)[3] and (2),[4] 47[5] and 48[6] of the American Convention on Human Rights (hereinafter "the Convention"), it is

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1 "Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

2 *"1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.*

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

3 *"Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: (a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."*

4 *"2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:*
(a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
(b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
(c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

5 *"The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:*
(a) any of the requirements indicated in Article 46 has not been met;
(b) the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;
(c) the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or
(d) the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

6 *"1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:*
(a) If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.
(b) After the information has been received, or after the period established has elapsed and the

evident that the decision on admissibility or inadmissibility that the Commission must issue under the provisions of these articles must be with regard to the specific "*petition or communication lodged*" which contains the pertinent denunciation or complaint against a State Party to the Convention, owing to violation of this instrument, and not with regard to other and different subsequent requests, presentations, documents, measures or decisions.

Similarly, on the same basis, it is beyond question that the said decision must, on the one hand, refer to the facts that the said petition refers to and, on the other, abide by its specific terms and, especially, what is requested or set forth in it.

The articles of the Convention cited above, which are those that the Court must apply and interpret,[7] leave no margin of doubt in this regard, because they refer clearly, precisely, expressly, repeatedly, and only to the "*petition or communication lodged.*" In this regard, they contain a peremptory mandate and, consequently, do not concede any margin for an interpretation other than the one set forth that differs from that which the States Parties to the Convention really agreed to in this regard, and as they stated in these articles.

However, as can be observed in the Judgment, this is not what happened in the instant case.

It is a fact of the case that, as it states, the request that originated the case was lodged on October 12, 2005, and, in its own words, is a "*petition and complaint against the State of Venezuela for the violation of human rights and due process of the victim Raúl José Díaz Peña, illegally detained ... ,*" for whom are requested "*measures in favor of the victim, who has health problems that must be treated as soon as possible and, once this has been decided, that* [the Commission*] continue on to decide the merits of the petition.*"

The note accompanying the petition, of the same date, reiterates that *"the following petition and complaint against the State of Venezuela* [is lodged] *for the violation of human rights and due process of the victim Raúl José Díaz Peña,"* and then indicates the "*human rights violated*" in the context of the criminal proceedings that were underway against the victim at the time concerned, successively, the "*prison conditions*," the "*illegal detention*" the "*accusation against Raúl Díaz Peña,*" the *"irregularities in the proceedings,"* the *"violations of due process,"* and the *"procedural delay*," all of which occurred prior to the submission of the said petition.

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information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.

(c) The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.

(d) If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or *communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.*

(e) The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.

(f) The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.

2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed."

7 Art. 62(3) of the Convention: "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

It is worth adding that the said request was only added to or complemented, without altering it, by notes from the petitioner dated June 14, and July 10 and 18, 2006, in response to a request of the Commission dated April 21, 2006, with information on judicial measures and decisions after the date of the petition and relating to the application for *amparo* [protection of constitutional rights] filed, to the evolution of the criminal proceedings, and to the requests concerning the detention conditions.

Thus, the foregoing reveals that the petition was founded on what had happened and was happening in the criminal proceedings and that, conversely, the precautionary measures that the Commission was asked to adopt, to be decided previously, as in fact was decided,[8] concerned facts that were taking place during these proceedings, which, according to the petition, were that Mr. Díaz Peña had "*health problems*."

This is corroborated by the Judgment itself, which states that, in the initial petition, the petitioner "*also, requested precautionary measures in favor of Mr. Díaz Peña,*" which "*were maintained while his detention lasted";*[9] in other words, in addition to what was requested with regard to what could be called the merits, it requested the said measures.[10] This is also supported by the subsequent observations of the petitioner that "*when lodging the petition before the Commission, no judgment convicting Raúl Díaz Peña existed and that, at that time, it was a question of protecting the rights to presumption of innocence and not to suffer unlawful deprivation of liberty, to be tried in liberty, and to due process, especially as regards compliance with a reasonable time, regarding which it alleged that the violations 'had already been committed and were gradually substantiated as the proceedings evolved.'"*[11]

In other words, the petition related basically and exclusively to what had happened up until October 12, 2005, in the criminal proceedings filed against Mr. Díaz Peña, considered as a unit or an indissoluble whole. This is also revealed in the circumstances that all the petitions made concerning the deprivation of liberty or preventive detention were filed before the judge before whom the said proceedings were being processed or in relation to him.[12]

Additionally, the Judgment itself recognizes that the petition referred fundamentally to the criminal proceedings in question, when it states that, up until the Admissibility Report of March 20, 2009, *"…it could have been considered that the matter related to a complaint of violation of due process … .*"[13]

Nevertheless, the Commission attributed another understanding or scope to the said petition, distinguishing three types of facts in it; some relating to the preventive detention and the length of the proceedings, others to irregularities in the criminal proceedings, and the third, to the detention conditions and the absence of medical attention. Based on this, it declared that the petition was inadmissible with regard to the second group of facts, and admissible in relation to the first and third group of facts.[14]

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8 Para. 94 of the Judgment. All references to paragraphs below will refer to the paragraphs of the Judgment.

9 Paras. 2(a) and 94.

10 Paras. 2(a) and 94.

11 Para. 113.

12 The fact that the precautionary measures ordered by the Commission are thus, according to Article 25(1) of its Rules of Procedure in force at the time,, "[*i]n serious and urgent cases,"* so that the "*State concerned"* adopts them *"to prevent irreparable harm to persons"* and, in accordance with Article 25(4) of these Rules of Procedure, the granting and adoption of them "*shall not constitute a prejudgment on the merits of a case"* is consistent with this observation.

13 Para. 122.

14 Para. 121.

It was this distinction, therefore, that allowed the Commission to proceed as it did; namely ruling not on the admissibility of the petition as it was lodged by the petitioner and in his terms, but according to the Commission's understanding of the petition, and that allowed it, therefore, to declare it inadmissible as regards one aspect, and admissible as regards the other two, as if the latter were not an indivisible part of the former.

For its part, although the Judgment notes that the Commission "*submitted to the Court all the facts described in merits report No. 84/10*,*"*[15] and despite recognizing that, at least up until the Admissibility Report, the complaint related to the criminal proceedings,[16] it follows the division made by the Commission as if this was a factual aspect of the case and not a methodological option, hence theoretical and questionable. By proceeding in this way, the Judgment did not rule on all the facts that had been submitted, but exclusively on the pertinent ones that had allowed the Commission to substantiate the partial admissibility of the petition.[17]

In other words, taking this approach, the Judgment validated the contradiction in which the Commission had incurred when submitting to the Court all the facts of the case and, at the same time, asking it to rule exclusively on some of them. Thus, considering that it was only competent to rule on the latter, the Court also considered those facts, not as they had been submitted in the petition, but as elements that had taken place outside the criminal proceedings taken as a whole.

2. <u>Rule of the prior exhaustion of domestic remedies</u>

From the articles of the Convention mentioned previously it can also undoubtedly be inferred that, for a petition to be admitted by the Commission, the requirement consisting in the prior filing and exhaustion of domestic remedies must have been met at the date of its presentation before the Commission, and not subsequently.

This is because the corresponding provisions of the Convention establish, peremptorily, on the one hand that "[*a]dmission by the Commission of a petition or communication [...] shall be subject to the following requirements: [...] that the remedies under domestic law have been pursued and exhausted*,"[18] and, on the other hand, that "[*t]he Commission shall consider inadmissible any petition [...] if: [...] any of the requirements indicated in Article 46 has not been met*,"[19] which include the said requirement of prior exhaustion of domestic remedies.

However, another fact of the instant case is that, at the date the petitioner lodged the petition before the Commission, that is October 12, 2005, the domestic remedies had not been exhausted.

In fact, bearing in mind that it corresponds to the petitioner to request that his petition be exempted from the obligation of having previously exhausted the domestic remedies in order to be admitted, it must be understood that the said remedies were not exhausted when the pertinent petition was lodged.

This is what occurred in the instant case. And this is expressly recognized in the petition itself, when it states that *"[o]wing to the legal situation of the citizen Raúl Díaz Peña in*

15 Para. 45.

16 Para. 122.

17 Paras. 55 and 121.

18 Art. 46(1)(a) of the Convention.

19 Art. 47 of the Convention.

Venezuela in this case, the exception to the exhaustion of domestic remedies under Article 46 is complied with." In other words, what it asks is that, for the petition to be admitted, the need to previously exhaust the domestic remedies should not be required, which logically leads to the conclusions that, in point of fact, it is accepting that the remedies were not exhausted when it was submitted because, if they had been, there would have been no need to invoke the exception established in the said provision.

The above is supported by the circumstance that the petition did not indicate which of the causes established in the pertinent norm[20] is invoked as grounds for applying the requested exception because, if it had done so, as established in the corresponding provision of the Convention, it would have had to indicate either the inexistence of due process, or the remedies to which access had been denied or which the petitioner had been prevented from exhausting or in which there had been a delay in the respective decision. If access had been denied to the pertinent remedies or if the petitioner had been prevented from exhausting them, or if there had been a delay in the respective decision, this should have been specified. But this did not happen; presumably because they were not filed or no attempt was made to do so.

To the above, must be added that the petition itself indicates "*Remedies filed*," namely: *"September 7, 2004: Petition for review of the judicial measure of preventive detention," "December 16, 2004, Request for a precautionary measure of liberty, for under 10 years in accordance with articles invoked by the prosecution," "March 1, 2005: request for a precautionary measure of liberty for, under 10 years in accordance with articles invoked by the prosecution," "April 14, 2005: Request for transfer to another detention center," "June 6, 2005, a precautionary measure again filed,"* and *"June 10, 2005, request for a transfer to another detention center for humanitarian reasons, based on the deterioration in the physical and emotional health of Raúl Díaz."*[21]

However, the said procedural actions are not really "remedies,"[22] because they do not allege the illegality or the arbitrary nature of a judicial decision; they were not requested to annul, to declare illegal or to invalidate; rather their purpose was to request the lifting of the measure of deprivation of liberty, the transfer of the person detained to another center or the realization of medical examinations and treatment and, all this, based on reasons other than the reasons for a remedy or an appeal. Perhaps, it is for these reasons that the petition did not refer to the said remedy and to the said measures in relation to compliance with the requirement of prior exhaustion of domestic remedies and that, on the other hand, it asked to be exempt from the latter.

Likewise, it must be said that it would be inadmissible to deduce from the mere fact of the presentation of successive requests, which strictly speaking do not contest a decision, in other words, that do not constitute real domestic "remedies," that the latter have been exhausted, because this could lead to the absurdity that it would be sufficient to present similar petitions several times in order to comply with the requirement of prior exhaustion of domestic remedies.

3. <u>The objection argued by the State</u>

Meanwhile it is also a fact of the case that the State, after receiving a copy of the "initial" or "original petition" in order to formulate its observations – that is during the admissibility proceeding and before the issue of the Admissibility Report of March 20, 2009 – mentioned the objection concerning prior exhaustion of domestic remedies in its

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20 Art. 46(2) of the Convention.

21 The Judgment alludes to three other requests; namely, dated February 21, June 9, and September 19, 2005 (para. 75).

22 *Diccionario Jurídico Universitario*, Editorial Heliasta, Buenos Aires, 2000, and *Diccionario de la Lengua Española*, Real Academia Española, Twenty-second edition..

briefs with observations on the petition of May 3 and August 5, 2007, indicating that the case was being heard in a criminal proceeding before a competent national court and *"the existing domestic remedies ha[d] not been exhausted."*[23]

Hence, the State's observations could only refer to the facts set out in the petition and not to those that occurred subsequently; and although "*the Commission indicated that after it received the initial petition it had identified*"[24] the three groups of facts mentioned above, it has been verified in this case that the distinction was made on March 20, 2009; namely, when the Commission ruled on the admissibility of the said petition,[25] which occurred three years and five months after it had been presented and that, in addition, was its first decision on the petition, since it had not issued any other that were not merely formalities, made, in any case, by its Secretariat.[26]

Hence, when formulating its observations and indicating that all the domestic remedies had not been exhausted in relation to the petition, the State could not have known about the division of the petition that the Commission made subsequently. The observation of the State, which the Commission considered to be a "*generic*" argument[27] was, consequently, consistent with what really happened, because the remedies against the ruling that ended the criminal proceedings could not have been determined or specified or, especially, filed at that point.

In this regard, it is also necessary to bear in mind that the objection of failure to comply with the prior exhaustion of domestic remedies is related, not to the State's obligation to provide theoretical or hypothetical information on the national or domestic law in force concerning remedies that could be filed against a decision, but rather to demonstrating the real and effective possibility of appealing, at the appropriate time, a specific existing decision. In other words, whether, at that time and in those circumstances, the remedies against the said decision are truly available and are adequate, appropriate, and effective; and, to this end, it is evidently essential to know the exact terms of the decision, which can only occur once it has been issued. Consequently, the State could not be required to refer to the specific remedies that could be filed before the said decision had been issued, nor could it be presumed, in the event that it makes a general and, therefore, theoretical reference to them, that they do not exist.

It is therefore evident that, since at the date of the petition (October 12, 2005), and at the date of the State's observation on this (in 2007), no judgment had been delivered in the criminal proceedings, it was impossible, in this case, to require the State to comply with the jurisprudential requirements of indicating precisely or in detail, the remedies that could be filed against a ruling that was only delivered, convicting the victim, on April 29, 2008.[28]

And this is why, also, that the Judgment records that *"[o]n November 12, 2009, in the brief with observations submitted in the proceedings on the merits of the case before the Commission and after admissibility report No. 23/09 of March 20, 2009, the State referred to the existence of the ordinary remedy of appeal, the appeal for review, and the constitutional review, as well as the possibilities of protecting Mr. Díaz Peña's rights*

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23 Para. 118, and also in the brief of August 8, 2007, presented in relation to the precautionary measures ordered.

24 Para. 112.

25 Paras. 39 and 122.

26 Art. 29(1) of the Commission's Rules of Procedure: "*Initial Processing: The Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented, …*".

27 Para. 111. Nevertheless, it did not proceed in the same way with regard to the petitioner's request that Article 46(2) of the Convention be applied to the petition, because it did not rule in this regard (para. 119(a)).

28 Para. 87.

at the eventual stage of execution of judgment established in the Venezuelan system of criminal procedure."[29]

The Commission's action has had another consequence that exceeds the provisions of international law, which is that the determination on admissibility was issued, not on the basis of the last decision of the State which, on October 12, 2005, had given rise to its international responsibility under international law, but principally on its decisions after that date.

4. Inadmissibility of the petition with regard to facts relating to irregularities in the criminal proceedings

Now, based on the above distinction that it made with regard to the petition, the Commission declared it inadmissible regarding "*the presumed irregularities of the criminal proceedings,"* because, owing to "*the waiver of the right to appeal the adverse judgment [...] the Commission found that, for these facts, the domestic remedies had not been exhausted and that, given the failure to comply with this requirement, the exceptions established in Article 46(2) of the American Convention had not been met.*"[30]

By doing this, the Commission not only considered events that had occurred after October 12, 2005; namely the adverse judgment of April 29, 2008, and even the convicted man's waiver to appeal the judgment on July 17, 2008,[31] but failed to deduce the corresponding logical conclusions from them. In other words, if it had considered the petition as a whole, as the petitioner requested, the way it proceeded would not have been possible. This is because the inadmissibility decided exclusively with regard to the irregularities in the criminal proceedings underway against Mr. Díaz Peña that, as mentioned, should have been established because at the time of the petition, the domestic remedies had not been previously exhausted, logically should also have resulted in inadmissibility with regard to the preventive detention and the duration of the proceedings, and to the detention conditions and to the lack of medical attention, because these circumstances occurred in the context of the said proceedings and not separate from them or with no close connection to them.

As already indicated, the Judgment validated the procedure followed by the Commission when it indicated, regarding "*the facts related to 'a group of irregularities in the criminal proceedings,' [...] the petition was declared inadmissible and, therefore, they do not form part of the factual framework of the instant case.*"[32]

Based on this statement in the Judgment, the Court appears to renounce the exercise of its "*authority [...], in matters it is considering, [...] to monitor the legality of the Commission's conduct, which does not necessarily mean reviewing the proceedings conducted before the latter, unless there has been a grave error that violates the right to defense of the parties.*"[33] This is because the said authority must be exercised if the State, despite having asserted the objection of failure to previously exhaust domestic remedies before the Commission, asserts this before the Court also; provided this is based on the "*rule ...* [that this] *is a defense available to the State";*[34] hence, not only and exclusively with regard to whether or not domestic remedies existed at the time of the petition, but basically regarding the decision which, on that occasion, the Commission adopted. Thus, it is specifically with regard to the decision taken by the

29 Para. 120.

30 Para. 119(f).

31 Para. 88.

32 Para. 121.

33 Para. 115.

34 Para. 114.

Commission on the matter that the Court has competence to rule and, unfortunately, this did not happen in the instant case, even though the State filed the corresponding objection.

5. Inadmissibility of the petition with regard to the facts relating to the pre-trial detention and the duration of the proceedings

The same can be said as regards the admissibility of the petition in relation to the facts corresponding to the preventive detention and the duration of the proceedings. This was established because the Commission found that this referred to a situation that was distinct and separate from the criminal proceedings. As mentioned above, this does not correspond to the content of the petition and, thus, it was not in order to separate it from the whole and establish partial admissibility on this basis.

But also and in addition, as indicated in relation to the whole petition, the said admissibility was established based on the fact *"that different appeals had been filed over the period from March 24, 2006, to May 11, 2007,"*[35] in other words, based on domestic procedural actions that took place months and years after the petition had been lodged, so that, obviously, they could not be included or invoked as its grounds.

This is precisely why the Judgment states that "*in these circumstances, it cannot be understood that the requirement of prior exhaustion of domestic remedies established in Article 46(1)(a) of the American Convention has been satisfied,"* and that "*furthermore [...] when the initial petition was forwarded to the State on February 23, 2007, the decision of May 11, 2007, that supposedly exhausted domestic remedies had not yet been issued*."[36] Consequently, it declared admitted "*the preliminary objection of failure to exhaust domestic remedies filed by the State is admitted as regards the facts relating to the preventive detention of Mr. Díaz Peña and the duration of the proceedings."*[37]

Furthermore, what is surprising is that the Judgment founded this statement also on the fact that "*[m]oreover, it cannot be considered that domestic remedies had been exhausted by the requests filed by Mr. Díaz Peña's defense counsel in the context of the criminal proceedings that were underway at the time,"* because *"the appropriate remedy in this regard, was to appeal the judgment delivered at the end of the proceedings,"* which *"Mr. Díaz Peña expressly waived the right to file,"* and on the fact that the Commission had declared that *"the arguments concerning the irregularities in the criminal proceedings that could have been rectified by contesting the adverse judgment were inadmissible*."[38]

In other words, this affirmation appears to recognize that the petition is dealt with considering the said three aspects merely because the Commission divided it up in this way and not because, in fact, these are three different matters. Moreover, the wording in the Judgment would appear to insinuate that, if the Commission had not considered the petition in this way, the decision on the admissibility of the petition would have referred only to the criminal proceedings, which would include, consequently, the facts relating to the preventive detention and the duration of the proceedings.

6. Admissibility of the petition with regard to the detention conditions and the lack of medical attention

35 Para. 123.

36 Para. 123.

37 Para. 125.

38 Para. 124.

Regarding the assertion in the Judgment, of the admissibility of the petition as regards the detention conditions and the deterioration in health or, as the Commission refers to them, the detention conditions and the lack of medical attention,[39] it can also be maintained that, as the Judgment itself infers,[40] all the facts gathered under this heading occurred in the context of the criminal proceedings, as is revealed by the circumstance that the requests concerning these aspects made by the detainee or his representatives were sent to the judge who was hearing the case.[41] It can also be stated that these requests, as in the case of the others, were mere administrative measures and not real remedies. These reasons would have been sufficient to declare admissible the objection filed by the State regarding non-compliance with the requirement of prior exhaustion of domestic remedies and inadmissible, consequently, the petition also as regards the detention conditions and the deterioration in health.

But, to this should be added, with all the more reason, that the facts of the case are that several of the said requests were admitted, that "*it is a proven fact that, following the adoption of the precautionary measures, his physical detention conditions gradually improved*"[42] and that, consequently, the detainee received medical attention.[43]

Therefore, the assertion made in the Judgment that, although "*the State cannot be blamed for the fact that, when presenting its observations on the petition, it made no specific reference to the available remedies*," an "*important exception*" existed in this regard "*that will be mentioned when analyzing the aspect regarding the detention conditions and the deterioration in Mr. Díaz Peña's health*."[44] And, this is difficult to understand because, when referring to this aspect the Judgment merely indicates that *"[t]he situation is different as regards the detention conditions and the deterioration in Mr. Díaz Peña's health*" and that, *"[c]onsequently, the exception to the requirement of prior exhaustion of domestic remedies established in Article 46)(2)(a) of the American Convention is applicable*," so that, without further explanation, it ends by rejecting "*the objection of failure to exhaust domestic remedies filed by the State as regards the detention conditions and the deterioration in Mr. Díaz Peña's health."*[45]

The Judgment does not support this. It does not indicate why that "*situation*" was "*different*" or why, even though "*the Commission had not yet explained the division of the different aspects of the case into three parts, the State could not ignore that, in this regard, it should have referred to precise and opportune remedies."* Nor does it throw any light on the reason why it reproaches the State for not having indicated "*the remedies that could have been filed to obtain an improvement in the poor detention conditions that were alleged and to prevent the consequent deterioration in Mr. Díaz Peña's health that was alleged."* And what is even more striking is that it concludes presuming, without providing any explanation either, that "there were no remedies to be exhausted."[46]

Since the statement made in the Judgment is contradictory and, all things considered, does not provide the arguments that would justify it, it is not comprehensible, and sows doubt as regards why the Court did not apply to this aspect of the petition at least the same consideration as it provided to the others

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39 Para. 126.

40 Paras. 91 to 108.

41 Para. 103.

42 Para. 94.

43 Paras. 100 to 107.

44 Para. 122.

45 Paras. 126 and 127.

46 Para. 125.

Conclusion

Finally, in this case, the said admissibility report and the Judgment that partially validates it affect the principles of subsidiarity and complementarity that imbue the inter-American system of human rights with the legal certainty and security with which its treaty-based provisions must be applied and interpreted, as well as the procedural balance and equality that should reign in the processing of "*petitions or communications lodged*" before the Commission and submitted to the Court and, therefore, placed and left the State in a situation of defenselessness.

Evidently, this opinion is issued, as in the case of other issued by the undersigned,[47] taking into consideration one of the specific imperatives faced by a tribunal such as the Court, which is that it must act with full awareness that, as an autonomous and independent entity, there is no higher authority controlling it, which means that, in honor of the high function assigned to it, it must strictly respect the limits of this function, and remain and evolve within the sphere appropriate to a jurisdictional entity. Undoubtedly, acting in this way is the best contribution the Court can make to enhancing the inter-American institutional framework for human rights, a requirement *sine qua non* for the safeguard of these rights.

This opinion is issued from this perspective, bearing in mind that the Court is called on to interpret and apply the Convention, mindful that changing or amending it is the competence of its States Parties,[48] so that, in the performance of its function, the Court must seek justice, not in abstract, but under the said Convention and not outside the Convention or in contradiction to it, or trying, directly or indirectly, to amend it.

It is based on the above that the Court's observations should be understood concerning "*the tolerance of 'evident violations of the procedural rules established in the Convention, would entail the loss of the essential authority and credibility of the organs responsible for administering the system of human rights protection,*"[49] and this is precisely why it was necessary, in this case, to admit totally the objection of lack of prior exhaustion of domestic remedies submitted by the State.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

47 Complaint submitted to the Court on August 17, 2011, and Dissenting Opinion, Judgment on merits, reparations and costs, Case of Barbani Duarte *et al. v.* Uruguay, of October 13, 2011.

48 Art. 76 of the Convention: "*1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.*

2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

49 Para. 43.